No. 2896

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

W. J. REID,

Appellee.

Brief for Appellant

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Appellant.

Post Office Address:

Great Northern Passenger Station,
Spokane, Spokane County, Washington.

McKEE PRINTING CO., SPOKANE.

No. 2896

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

W. J. REID,

Appellee.

Brief for Appellant

STATEMENT OF THE CASE

This case comes before this court upon appeal from the District Court of the United States for the Eastern District of Washington, Northern Division, appellant herein being the defendant in the court below, and hereinafter referred to as the defendant, and appellee herein being W. J. Reid, hereinafter referred to as the plaintiff. The Hon. Frank H. Rudkin, District Judge, tried the case.

The action was brought upon a bill in equity, alleging that on May 10th, 1915, defendant was op-

erating a work train; that the plaintiff was a cook on such train, and that in the operation of the train the cook car in which the plaintiff was working left the track; that the top of the cook stove fell upon plaintiff's foot, and the plaintiff suffered a double inguinal hernia, broken arch of the right foot, wrench to the back and a shock to his nervous system; that since the injury he has been working some.

That on the day of the accident he went from Geyser, where the derailment occurred, to Great Falls, and was there taken by a claim agent, while he was in an alleged exhausted and nauseated condition, to a physician, and after an alleged cursory examination was informed that his injuries were slight; that he had a nervous shock and a slightly sprained ankle and instep, but that in a day or two he would recover; that he was paid the sum of ten dollars for the purpose, as claimed by the plaintiff, of paying him two or three days' time that he might remain in Great Falls for rest, and that at said time he signed an instrument, which he claimed was stated to him to be a receipt for ten dollars; that he did not read the paper; that on account of his alleged condition he claimed he could not read or comprehend it, did not have time to do so; that he relied upon the alleged statements of the claim agent and physician, and that it was a receipt for ten dollars, and that this was the only paper signed by him. He claimed that the signature of this paper was obtained through

fraud, misrepresentation and deceit, and that he never executed any release, and he claimed that the subject of settlement was not discussed. The release is set forth in the complaint (Tr. p. 8). He claimed he did not know whether it was in the same condition as it was when he signed it. He further alleged that he did not know within eight hours of the accident that he had broken the arch of his right foot or suffered double inguinal hernias, or any injury of any kind, and that the injuries were never taken into consideration at the time he signed the instrument; (p. 10) that an action for damages for personal injuries has been brought on the law side of the court; that defendant had set up in its answer the release as a bar; that a tender of the amount paid was made, which was refused. (P. 12.) Plaintiff prayed that the release be decreed to be null and void, and for such other and further relief as might be agreeable to equity. (Tr. 1-14).

The defendant by its answer admitted the derailment of the car, and that the plaintiff received some slight injuries at that time; denied that plaintiff suffered a double inguinal hernia or broken arch of his right foot, or severe wrench of his back or severe shock to his nervous system, or any great or excruciating physical pain or agony or semi-paralyzed condition of his legs. Denied that prior to the time of the accident he was a well man, or that he had been in any other state of health since his injuries than he was before. Defendant admitted that plaintiff went with the claim agent of the defendant on

the 10th of May to the office of a physician and surgeon at Great Falls; that upon examination made at that time the physician found that the plaintiff had suffered a bruise to his arm and shoulder and some slight injuries to his ankle, and informed the plaintiff to that effect; that the plaintiff claimed that the defendant was liable for the injuries; that this was denied by the defendant; that negotiations were had between them and a compromise and settlement was agreed upon on that day and settlement made; that the defendant paid the plaintiff the sum of ten dollars, in consideration of the settlement, and that in writing he released the defendant. Defendant specifically denied that at the time of the settlement plaintiff was sick or was in an exhausted condition, was affected with nausea or was not in full possession of his faculties; denied that there were any misrepresentations made by the defendant, or that the sum of ten dollars was paid for any other purpose than the release, or that the release was executed while the plaintiff was in a nervous condition or not in full possession of his faculties. It denied that the plaintiff relied upon the statement of the claim agent or physician, and alleged that he read the paper and that he fully understood the contents thereof. It alleged that he executed not only the release set forth in the complaint, but a duplicate of the same and an original and duplicate voucher, and endorsed a draft. It specifically denied that the signatures were procured either through fraud, misrepresentation or deceit, and alleged the execution

and delivery of the release; that a claim was presented for the injuries and settlement was discussed. The execution of the release, as stated in the complaint in paragraph 17, was admitted. It alleged that all injuries suffered by the plaintiff were taken into consideration; admitted the suit started on the law side of the court, and tender and refusal, and prayed the dismissal of the bill. (Tr. 15-24).

The case came on for trial upon September 26th, 1916, and after the defendant had moved to strike certain testimony and dismiss the bill, which motions were overruled, the case was submitted to the court for its decision. (Tr. 25-80).

Upon the 12th of October, 1916, Judge Rudkin filed his opinion, in which he found that there was no fraud, misrepresentation or deceit upon the part of the defendant or its representatives, and that some of the injuries claimed were not known or suspected by either of the parties at the time of the settlement, and that of these alleged injuries the evidence went far to show that the conditions now claimed arose out of disease, rather than accident. (Tr. 85-93). Nevertheless, on November 14th, 1916, judgment was entered, sustaining the release for injuries to the right foot and arm and shoulder. The release was set aside so far as it purported to release any claim for damages for other injuries complained of, and set forth in the complaint. (Tr. 94.)

Assignment of errors was filed (107-109) and ap-

peal to this court was perfected by petition, order allowing the same, order allowing bond, bond on appeal and citation. (110-120).

ASSIGNMENT OF ERRORS

The following errors specified as relied upon, and each of which is asserted in this brief and intended to be urged, are set out in the assignment of errors appearing in the printed record.

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in allowing the plaintiff to answer the question:

> "Q. State to the Court your injury and the cause of it." (Tr. p. 26).

II.

That the Court erred in allowing the witness, Dr. George A. Downs, to answer the question:

> "Q. State to Judge Rudkin what you found at that time in your examination." (Tr. p. 43).

III.

That the Court erred in denying the motion of the defendant to strike all the testimony in the record received subject to its objection, and all testimony relating to conditions or injuries developing subse-

quent to the time of the settlement, and all testimony relating to the injuries, if any, which were not known to either or both parties at the time of the settlement. (Tr. p. 79).

IV.

That the Court erred in denying the motion of the defendant to dismiss the bill to set aside the release. (Tr. p. 80).

V.

That the Court erred in finding that the release was no bar to an action by the plaintiff for any damage sustained by him aside from the injury to his foot. (Tr. p. 93).

VI.

That the Court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant. (Tr. p. 94).

VII.

That the Court erred in rendering and entering judgment herein, sustaining said release in so far as it purported to release any and all claims for damages for injury to the right foot and for injuries to the arm and shoulder, and cancelling, annulling, setting aside and holding for naught said release in so far as it purported to release any claim for damages for other injuries, complained of and set forth in the complaint in said action. (Tr. p. 94).

VIII.

That the Court erred in rendering and entering judgment setting aside the release described in said complaint. (Tr. p. 94).

IX.

That the Court erred in rendering and entering a judgment cancelling, annulling and setting aside and holding for naught said release, in so far as it purports to release any claim for damage for other injuries complained of and set forth in the complaint in said action. (Tr. p. 94).

STATEMENT OF FACTS

A comprehensive view of the facts in this case may be obtained from a perusal of Judge Rudkin's opinion. It is given here in full. The italics are ours.

RUDKIN, District Judge: "On and for some time prior to the 10th day of May, 1915, the plaintiff was in the employ of the defendant as a cook on a work train at different points in the State of Montana, and on the above date while so employed near the town of Geyser, the car in which he was at work became derailed, inflicting upon him certain personal injuries which form the basis of the present controversy. The accident happened at about nine o'clock in the morning, and soon thereafter the plaintiff went, or was taken, to Great Falls, Montana, and called upon the claim agent and surgeon of the defendant company. As a result of the derailment a stove cover or lid fell on the plaintiff's foot, and for this injury the surgeon treated him by bandaging the injured member. After leaving the surgeon the plaintiff was taken to the claim department and there, in consideration of the sum of ten dollars to him paid, executed the following release:

> "KNOW ALL MEN BY THESE PRESENTS, that in consideration of the sum of Ten and No/100 Dollars, to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted and discharged, and do, by these presents, release, acquit and discharge said railway company, its successors and assigns of

> and from any and all liability, causes of action, costs, charges, claims or demands of every name or nature, in any manner arising or growing out of, or to arise or grow out of personal injuries received by me (W. J. Reid) at or near Geyser, in the State of Montana, on or about the 10th day of May, 1915, while acting as a cook, I met with an accident whereby I sustained personal injury; or arising, or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said railway company prior to the date of these presents.
>
> "No promise of future employment has been made to me by said railway company as part consideration of this settlement and release, or otherwise."

The back of the release contained the following endorsement in the handwriting of the plaintiff and signed by him:

> "I have read within Release before signing and fully understand that the sum of ten dollars is in full settlement of all claim of every kind."
> —W. J. Reid.

The voucher signed by the plaintiff contained substantially the same recital, viz.:

> "For and in consideration of any and all claims past, present and prospective against the Great Northern Railway Company arising or to grow out of personal injuries received by me at or near Geyser, Montana, on or about May 10th, 1915."

Soon after the execution of this release and the receipt of the money, and on the same day, the plaintiff returned to Geyser and resumed his former em-

ployment that evening with the defendant and continued in that employment until the second day of July following. Thereafter an action was commenced on the law side of this court to recover damages for personal injuries growing out of the accident in question, and the foregoing release was pleaded in bar. Thereafter the present suit was commenced on the equity side of the court to cancel and set aside the release on the ground of fraud and mistake.

The injuries sustained by the plaintiff as set forth in his complaint are the following:

A broken arch of the right foot; a double inguinal hernia; a severe wrench of the back; and a severe shock to the nervous system. The grounds upon which the release are assailed are the following: *First.* That the surgeon of the defendant company, after a cursory examination, informed the plaintiff that his injuries were slight and amounted to nothing beyond a mere nervous shock, and a slightly sprained ankle and instep, and that he would entirely recover in the course of a day or two; and that the claim agent of the defendant company informed the plaintiff that he would give him ten dollars, representing two or three days' pay; that the plaintiff might remain in Great Falls during that period, and that his position would be held open for him. *Second.* That the plaintiff's physical and mental condition was such that he was unable to read or comprehend the contents of the receipt; that he did not have time to read the same; that he signed it relying upon

the representations of the claim agent and surgeon that it was a receipt for ten dollars and nothing more; and that he would not have signed it but for these representations. And *lastly;* that the injuries above set forth were not taken into consideration by or known to the plaintiff or the representatives of the defendant at the time the release was executed.

One who seeks to set aside a release or other solemn contract on the ground of fraud or mistake must make out his case by clear and convincing proof. A mere preponderance of the testimony will not suffice. Guided by this wholesome and salutary rule *proof in this case utterly fails as to the first and second grounds above set forth. Manifestly no misrepresentations of any kind were made to the plaintiff by the surgeon or the claim agent either as to the nature or extent of his injuries. As a matter of fact, it clearly appears, not only from the testimony but from the allegations of the complaint as well, that none of the parties concerned knew or even suspected that the injuries sustained by the plaintiff were more than superficial.* The injury to the right foot was the only injury complained of, aside from a slight bruise on the arm or shoulder which the plaintiff himself deemed so trifling and inconsequential that he refused to remove his coat so that the surgeon might examine it. And a word here as to the extent of the injuries to the foot may not be out of place. No doubt the arch of the right foot is now broken down; but for that matter so is the arch of the left

foot. The testimony shows clearly that the plaintiff complained continuously of his feet prior to the accident, and that his shoes were all slit up to relieve them. This goes far to show, if it does not demonstrate, that the present condition of his right foot is the result of disease or other infirmity rather than of the accident complained of.

The claim that the plaintiff was unable to read or comprehend the contents of the release by reason of his physical and mental condition is likewise unfounded. The testimony shows that he fully comprehended all that transpired about him, and he was able to contradict the testimony of other witnesses whenever it appeared to his interest to do so. He told the entire work crew at supper that night that he had settled with the railroad company for thirty dollars, and in a letter written a few months later he again refers to the settlement. He took up his usual avocation as soon as he could return to Geyser after the execution of the release, and as already stated, *it is all but certain that no person connected with the affair, including the plaintiff himself, had the slightest suspicion that his injuries were at all serious. Written contracts and the statute of frauds will be of little avail if contracts are to be ruthlessly set aside upon such a showing.* The only question in the case that gives rise to any doubt in my mind is the question of mistake. If the plaintiff received injuries other than the superficial injury to his foot it is shown beyond question that such injuries were

unknown to the contracting parties, and were not taken into consideration in the settlement made. Is this a sufficient ground in equity for setting aside the release? All the authorities agreed that a release of this kind can not be avoided for mere mistakes of opinion or prophecy; in other words, merely because the injuries prove more serious and lasting than the parties thought them to be. Some of the authorities go so far as to hold that a general release of this kind can not be avoided for mutual mistake at all. Thus in *Houston & T. C. R. Co. vs. McCarty,* 60 S. W., 429, the only injury known to or within the contemplation of the contracting parties was an injury to the ankle; but it later developed that there were injuries to the spine and bowels, which were of much graver and more permanent character than the injuries settled for, yet the Supreme Court of Texas held that the release was an absolute bar to the action, stating its conclusion in these words:

> "Our conclusion is that the release embraces all damages resulting from the injuries of the plaintiff, and that it can not be varied by parole evidence tending to show that other injuries than that to the ankle were not in the contemplation of the parties."

This is the extreme view, however, and is not supported by the weight of authority.

Lumley vs. Wabash R. Co., 76 Fed. 66.
Great Northern Ry. Co. vs. Fowler, 136 Fed. 118.

In the cases last cited the releases were avoided for mutual mistake of the parties, and while the form

of the releases may have differed to some extent from the release now under consideration no importance seems to have been attributed to that difference. If, therefore, the plaintiff in this action sustained injuries other than the slight injury to his foot, such injuries were not within the contemplation of the contracting parties and the release should not be permitted to stand in the way of a recovery therefor.

Now as to the nature and extent of the injuries suffered by the plaintiff as a result of the accident complained of. It will readily be conceded that at the present time his body is poorly nourished and that his general health and physical condition are far from good. *It cannot be said, however, that these conditions are attributable wholly, or even in a considerable part, to the accident. According to the testimony of one of the physicians his present ailments are, in the order of importance, first, arterioschlerosis; second, double inguinal hernia; and third, double flat foot. It does not appear from the testimony that the first of these was produced in any wise by the accident, and while the condition of the right foot may have been aggravated by the accident it was not caused thereby. The plaintiff had one hernia on the right side for a period of some two years prior to the accident, caused by lifting ice into an ice box, and the second developed soon after the accident. The course of its development, however, is left in doubt and uncertainty.* The plaintiff simply states that he felt a pain in that region the day after the accident, and

that he complained of such an injury to the railroad company in June following the accident; but the first definite information we have on the subject is found in the testimony of the physicians who examined him some eight or nine months later when his condition was found substantially the same as it is today. Beyond this the testimony throws no light upon his condition or the cause thereof. Good faith, common honesty, and the peace of society demand that compromises and settlements of this should be upheld unless impeached for fraud or mistake by clear and convincing proof. As well said by Judge Sanborn in *Chicago & Northwestern Ry. Co. vs. Wilcox,* 116, Fed. 913:

> "The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims. It loves peace, hates broils and dissensions, and discourages the prolongation of litigation and the revival of controversies which have once been closed. The judgment of a court settles the claims submitted to it, and estops the parties from again litigating them after they have been adjudicated. In the absence of fraud or mistake, an executed agreement of settlement of an unliquidated or disputed claim constitutes as conclusive and as effectual an estoppel against the parties to the compromise from again litigating the claim thus settled as the final judgment of a court of competent jurisdiction, to the effect that the rights of the parties are as they are set forth in the agreement; and such a contract is always upheld by the courts * * * Nor will such agreements be lightly disturbed upon confused, conflicting, or uncertain evidence of fraud or mistake. The burden is always upon the assailant

> of the contract to establish the vice which he alleges induced it, and a bare preponderance of evidence will not sustain the burden. A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal, and convincing."

Nevertheless the condition of the plaintiff is a pitiable one. He is illiterate and far below the average in intelligence, and if he has sustained injuries not embraced in the compromise set forth in the complaint he should have his day in court and an opportunity to establish his rights before a jury. I am therefore of opinion that the release is no bar to an action by the plaintiff for any damages sustained by him aside from the injury to his foot, which was clearly within the contemplation of the parties when the settlement was made. Whether a release of this kind can be set aside in part may admit of question, although I see no reason why it should not be sustained insofar as it sets forth and embodies the actual agreement of the parties.

See *Lumley vs. Wabash R. Co., supra,* and cases there cited.

This question will be determined, however, when the final decree is submitted." (Tr. pp. 85-93).

From the foregoing opinion it is apparent that no fraud, misrepresentation or deceit was shown, either in:

(a) Statements made by the surgeon or claim agent as to the extent of his injuries, or

(b) That the money paid him was anything else than a settlement and release, or

(c) That the character of the transaction was misrepresented to him, or that he did not understand it.

The only doubt in the Court's mind was whether the injuries claimed, other than the injuries to his ankle, arm and shoulder were actually sustained by the plaintiff, and if so, whether they were included or intended to be included in the settlement as made, and if they were not known at the time of the settlement, were they released by the settlement.

This leaves in the case, therefore, the questions only as to the binding force of a release given in general terms, and whether or not under the conditions which surrounded the execution of this release it can be partly set aside now, on the claim that he now has injuries which were not complained of by him at the time of the settlement.

The propositions that are before this court then are:

1. *Was there clear and convincing proof that there were injuries received at the time of the accident, which were not disclosed by the parties to the settlement, or known to them?*

2. *Is the plaintiff by his conduct estopped from now claiming payment for such alleged newly discovered injuries?*

3. *Did the release which was a release for his personal injuries, and which he stated in his own handwriting was "in full settlement of all claims of every kind," constitute by its terms a bar to any action on account of personal injuries?*

ARGUMENT

I.

THERE WAS NO PROOF THAT AT THE TIME OF THE ACCIDENT PLAINTIFF SUFFERED ANY INJURIES WHICH WERE NOT COVERED BY THE RELEASE AND THE SETTLEMENT.

In the first place this is not an action brought to reform a release, but it is brought to wholly set aside a release upon two grounds:

(1) Fraud. (2) Mistake.

The Court has specifically found that no fraud existed in any respect.

The mistake claimed is that plaintiff did not know at the time of the settlement that he had a double inguinal hernia or broken arch of his right foot, or had suffered any hernia of any kind or any injury which might cause any disability, and that these injuries were not taken into consideration by the plaintiff or defendant.

There are certain well known principles, which govern settlements and attempts to set them aside on the ground of alleged mistake:

The policy of the law is to promote and sustain the compromise and settlement of disputed claims.

Settlement agreements will not be distrubed on confused and conflicting or uncertain evidence of mistake.

The burden is on the plaintiff to prove the mistake, and a bare preponderance of evidence will not sustain the burden.

A release cannot be rescinded unless the evidence of mistake is clear, unequivocal and convincing.

When the signing of the release is admitted, the burden is on the plaintiff to prove the mistake claimed. Mistake is not presumed. The presumption is always in favor of validity and not mistake. In no doubtful case does the Court lean to the conclusion of mistake. It is not to be assumed on doubtful evidence, and the mistake must be clearly and strictly proven as alleged.

Mistakes in prophecy or opinion or of belief, relative to an uncertain future event, cannot be considered grounds for setting aside a release.

Mistakes as to future unknowable effect of existing facts, future uncertain duration of a known condition; or as to the future effect of a personal injury, will not be an occasion for avoiding a release.

Courts of Equity adopt a more stringent rule as to the burden of proof or the weight of the evidence than courts at law, and will not lightly set aside the parol evidence rule. The settlement of a controversy is valid, not because it is the settlement of a valid claim, but because it is the settlement of a controversy. Such settlements are favored by the law, and in the absence of fraud, mis-

representation or concealment, clearly and convincingly shown, a promise thus entered into must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision.

These principles are sustained by the following authorities:

El Paso & S. W. Ry. Co. vs. Kramer (Texas), 141 S. W. 123.
Quebec vs. Gulf C. & S. F. R. Co. (Texas), 66 L. R. A. 734; 81 S. W. 20.
San Antonio & A. P. R. Co. vs. Polka, 124 S. W. (Texas) 226.
Kowalke vs. Milwaukee Elec. Ry. & Light Co., 79 N. W. (Wis.) 762.
Foster vs. University Lbr. & Shingle Co., 131 Pac. (Ore.) 736.
Jossey vs. Georgia S. & Ry. (Ga.) 34 S. E. 664.
Lawton vs. Charlestown & W. C. Ry., 74 S. E. 750.
Chicago, St. P. M. & O. Ry. vs. Belliwith, 83 Fed. 438.
Barker vs. N. P. Ry., 65 Fed. 462.
C. & N. W. Ry. Co. vs. Wilcox, 116 Fed. 913.
Wagner vs. National Life Ins. Co., 90 Fed. 395 at p. 407.
Doty vs. C. St. P. & K. C. Ry., 52 N. W. (Minn.) 135.
Aderholt vs. Seaboard Air Line, (N. C.) 67 S. E. 978.
Seeley vs. Citizens' Traction Co., 36 Atl. 229.
Houston & T. C. Ry. Co. vs. McCarty, 53 L. R. A. 507.

Birmingham Ry., Light & Power Co. vs. Jordan, 54 So. 280.
Nath vs. O. R. & N., 72 Wash. 664, 131 Pac. 251.
Erickson vs. G. N., 57 Wash. 520, 107 Pac. 365.
Spratt vs. N. P., 90 Wash. 592, 156 Pac. 563.
2 *Pomeroy Eq. Jur.*, Sec. 850.

In considering the question of the evidence relating to injuries Judge Rudkin found:

> "Now as to the nature and extent of the injuries suffered by the plaintiff as a result of the accident complained of. It will readily be conceded that at the present time his body is poorly nourished and that his general health and physical condition are far from good. *It cannot be said, however, that these conditions are attributable wholly, or even in a considerable part, to the accident.* According to the testimony of one of the physicians his present ailments are, in the order of importance, first, arteriosclerosis; second, double inguinal hernia; and third, double flat foot. It does not appear from the testimony that the first of these was produced in any wise by the accident, and while the condition of the right foot may have been aggravated by the accident it was not caused thereby. The plaintiff had one hernia on the right side for a period of some two years prior to the accident, caused by lifting ice into an ice-box, and the second developed soon after the accident. The course of its development, however, is left in doubt and uncertainty. The plaintiff simply states that he felt a pain in that region the day after the accident, and that he complained of such an injury to the railroad company in June following the accident; but the first definite information we have on the subject is found in the testimony of the physicians who examined him some eight or nine months later when his condition was found sub-

stantially the same as it is today. Beyond this the testimony throws no light upon his condition or the cause thereof. Good faith, common honesty, and the peace of society demand that compromises and settlements of this kind should be upheld unless impeached for fraud or mistake by clear and convincing proof. As well said by Judge Sanborn in *Chicago & Northwestern Ry. Co. vs. Wilcox,* 116 Fed. 913:

'The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims. It loves peace, hates broils and dissensions, and discourages the prolongation of litigation and the revival of controversies which have once been closed. The judgment of a court settles the claims submitted to it, and estops the parties from again litigating them after they have been adjudicated. In the absence of fraud or mistake, an executed agreement of settlement of an unliquidated or disputed claim constitutes as conclusive and as effectual an estoppel against the parties of the compromise from again litigating the claim thus settled as the final judgment of a court of competent jurisdiction, to the effect that the rights of the parties are as they are set forth in the agreement; and such a contract is always upheld by the courts * * * Nor will such agreements be lightly disturbed upon confused, conflicting, or uncertain evidence of fraud or mistake. The burden is always upon the assailant of the contract to establish the vice which he alleges induced it, and a bare preponderance of evidence will not sustain the burden. A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal, and convincing.'"

An examination of the evidence clearly discloses the following:

Reid had been ruptured three years before; had worn a truss for two years. (32) His work required him to lift heavy articles, such as barrels and sacks of flour, potatoes, boxes, sides of beef, cakes of ice. (36, 68) The prior rupture had been occasioned by his catching a cake of ice, producing an internal strain. (32) This, according to the only medical testimony on the subject, rendered him predisposed to rupture. His first rupture was on the right side, and was the much more serious of the two. Dr. Marshall testified that when a man was operated on for hernia on one side, it was quite likely that he had one on the other side; that the usual cause of hernia was lifting; that hernias are usually bi-lateral; that is, on both sides. (66)

Reid had had considerable trouble with his feet before the accident, complained of them swelling, of rheumatism, cutting shoes on account of this, and used liniment on his feet. (67-78) He was at the time of the accident, according to Dr. Longeway, a poorly nourished man. (47)

On the morning of the accident, the car which was being moved in a switch movement, was derailed, the stove lid fell on his right foot, and he says that he was thrown bodily against the sink, which was near the side of the car and it hurt him. (27)

> "I got hurt on my foot, and I was shaken up completely, my nerves—nervous shock—and I have been sick practically ever since." (27)

There is no evidence that the hernia on the left

side was occasioned by the accident. The only evidence about this is the following:

> "Q. When did you first know, Mr Reid, that you had a double hernia?
> A. I don't know now. The next day I didn't know what it was, down there where it hurt." (Tr. 29).

He then testified that he had a rupture before, a very small one on the right side, about the size of a marble. (30) The complaint (paragraph 6) claims but one double inguinal hernia, and the first claim to the company that he had received a rupture was some time in June, the accident happening upon May 10th. (37) The first evidence of his having two ruptures is shown by the testimony of Dr. Downs, who examined him on February 26th, 1916. (44) There is no evidence of the appearance of a second rupture until that time. His only claim is that the next day he discovered something down there where it hurt. (29) This certainly is insufficient upon which to predicate a double inguinal hernia as the result of the accident,—especially in view of his conduct thereafter. No claim is made that his left foot was injured, and yet an examination on the same day disclosed flat-footedness in both feet, slightly more marked in the right than in the left, and an examination the day before the trial disclosed broken arches in both feet. (45, 46, 47) His conduct entirely negatives the broken arch as the result of the accident. He got down out of the car, walked to the station unassisted; no evi-

dence of a cane or crutch, took the train, rode fifty miles to Great Falls, and there went to the office of the claim agent. (29, 31, 33) His claim is that he went in an automobile. Even McElroy,—a discharged employe, threatening to sue the company and its officers, does not substantiate this automobile claim. He walked down the stairs from the claim agent's office, a block and a half, to Dr. Longeway's office, and up the stairs, then back down over to the depot and took the train back to Geyser the same day, (51-56) went to work that afternoon, and worked from that time on until the second of July continuously, without a break. (67-74) To substantiate his claim of injury he called three witnesses, McElroy, Wells and Cotton. All that McElroy said was that at Great Falls on his arrival he seemed to be in pain, and was limping; (41) Wells testified that he had a rupture two and one-half years before the accident and that he saw him in Spokane after his return from Montana and his condition was very poorly, but he would not say that he was walking with a cane, even at the instance of plaintiff's attorney. Wells testified that he used to room with him. (39-40) Cotton, employment agent, testified that about three years ago, or a year and a half before the accident was the last time he shipped Reid out, and that he was in good health at that time. (43) This in spite of Reid's own admission and Wells' testimony that at that time he was suffering from a rupture. (32, 40)

A very remarkable thing is that he testfied that he is a married man and has a wife and two children, (26) but he fails to call any of them to corroborate his testimony with reference to his condition, either before or after the accident. Instead of using those, who would undoubtedly know more about his condition than any other living outside persons, excepting Reid himself, he calls a cook and a helper in the employment office, who knew nothing of the accident or his condition at the time. The testimony offers no excuse of any kind for not calling his wife or family. Certainly, this would seem to be a very substantial element determining the weight of the plaintiff's testimony, in an effort to overturn a settlement by clear and convincing proof.

He appears to have worked at several places since his injury, and probably in the nature of the work,—cook in mines, construction camps and restaurants,—held his job as long as men in his situation usually do. (31, 32, 38) There is an entire failure of proof on the claim of fraud. The only thing he told the doctor was that if there was anything the matter with him he wanted to go to the hospital and get something done. (34) Dr. Longeway testified specifically as to conversation had with Reid, (46-47) and this testimony is absolutely undisputed, except that Reid on rebuttal said that he did not refuse. (79) He does not deny the conversations detailed by Dr. Longeway and Mr. Burton. He detailed the manner in which the accident happened and then said that the stove lid hit his right

foot; that he had a bruise about the shoulder and about the arm; he said that the arm didn't amount to anything.

> "I asked him to take off his coat and he said that it didn't amount to anything, his injuries were not bad and he wouldn't take off his coat and let me examine it. He said that would be all right; he was just bruised about the right arm and shoulder. Consequently he didn't take off his coat and I didn't examine his arm. He said it didn't amount to anything and would be all right. I bandaged his foot and told him to stay around two or three days and let me watch him. 'No,' he said, 'It's all right.' He wanted to get right back to work and he left my office and that was the last I ever saw of him." (Tr. 46.)

Instead of the doctor's telling him, as he claimed, that his injuries were slight and that he could go right back to work, the testimony, which is not denied is that

> "I asked the man to stay around two or three days where I could take care or look after him, and he said 'No,' his injury didn't amount to anything, and that he wanted to go right back to work." (Tr. 47).

The doctor did tell him that he thought with reference to his injury he would be all right very shortly, although he thought he better stay around there perhaps two or three days to see if this ankle swelled up any more. It was the doctor's belief that he would be all right in a few days. (47) In this he seems to be corrobated by the man's own actions immediately thereafter, in doing the work which he

did do around the cook car. There is no claim and could not possibly be under the evidence, that the doctor was either aware or should have been aware of the hernias, or either of them, or that he deceived or intended to deceive the plaintiff with reference to the effect of the injuries which he had. The only possible claim that could be made is that there may have been a mistake by the doctor in his prophecy as to the duration of his disability. The authorities are unanimous,—including all those cited by the plaintiff,—that equity will not avoid a written contract of settlement for any mistake of prophecy.

Of the six elements of fraud,—all of which are necessary to exist before a release can be avoided,—it would seem that plaintiff has wholly failed to substantiate even half of them. There is no showing that the statement made by the doctor was false; that he knew it was false, or made it recklessly, without any knowledge of its truth or as a positive assertion, or that he made any statement with the intention that it should be acted upon by the plaintiff. Plaintiff claims that he acted in reliance upon the doctor's statement; that it was material, and that he suffered injury thereby, but the preponderance of the evidence is against all of these contentions.

With reference to the execution of the release papers, plaintiff's contention that there was fraud is entirely negatived not only by the great weight and preponderance of the testimony, but by his own acts. He claims in his complaint with reference to this that

he was nauseated, not in full possession of his faculties, was induced to sign a release upon the representation that it was a receipt for the time spent in resting at Great Falls for two or three days,—which upon its face is negatived by his own statement that he went right back to work that same day,—that he did not read and could not read the paper; that the question of setlement was not discussed with him. He claims that these representations were made to him by the physician and claim agent. He does not by his testimony show any statement made by Dr. Longeway with reference to settlement, and the only testimony with reference to settlement talk with Dr. Longeway is Dr. Longeway's own testimony that he had no such conversation and settlement was not discussed with him, and his conversation related solely to the man's injury. After his examination by the doctor he walked along the street, purchased some balsam, had a conversation with Mr. Burton with reference to settlement, which is not denied, in which conversation, at the corner, he told Mr. Burton that he thought he could be fixed up on the payroll with reference to settlement, and was informed that this could not be done; it would have to be taken care of by the claim department; that he went up to the claim agent's office for the express purpose of settling, and he knew it. (Tr. 57, 52).

Reid claims that he cannot remember one thing he signed or anything about the settlement, yet he details the words of a conversation at the time, and says

with reference to the ten dollars that Mr. Foley suggested that himself. (Tr. 79). His account of the transaction in the claim agent's office is as follows:

> "Q. State what he said to you?
>
> A. Why, he said it was necessary to send these back to St. Paul. That is what he said to me.
>
> Q. Did he offer you any money?
>
> A. No, said, 'No, you better take ten dollars for to get some liniment' and something like that—'ten dollars to get some liniment to rub on my foot.'
>
> Q. Did he say anything to you about your working or anything?
>
> A. Yes, he did. Said I could just stay around town two days and go back to work whenever I wanted to." (Tr. 29).

He reiterates again that the claim agent told him that this ten dollars was to buy liniment with. (29, 34) That the claim agent dictated the endorsement on the back of the release but that that was in his handwriting. (35) Outside of this testimony he does not dispute in any way the testimony of Mr. Burton and Mr. Foley, as to what actually transpired at the time of the settlement.

An examination of the papers which he signed shows that at the time of the settlement he signed his name seven times. There was an original and duplicate release, which he signed once on the face and once on the back of each one, two vouchers, each of which he signed, and the draft which he endorsed upon the back, all of which papers, except the draft, specifically set forth that ten dollars was

paid in full consideration of all his claims, on account of his personal injuries sustained on the tenth day of May. (35, 54, 60) Upon the back of each release he wrote in his own handwriting:

> "I have read within release before signing and fully understand that the sum of ten dollars is in full settlement of all claim of every kind." (35, 55, 61)

It is immaterial whether he copied this from a slip of paper, or whether it was dictated to him. The fact is that it was brought to his consciousness that he was settling in full for all claims. His version of the payment of the ten dollars that it was for the purpose of buying some liniment is too absurd for credibility, especially in view of the fact that he had already purchased two tubes of balsam for fifty cents.

His letter written October 22nd clearly states:

> "And I settled with you ten dollars * * * I am now well again." (Tr. 84)

There is no claim whatever in this letter of any rupture having been caused, or having existed by reason of his accident upon May 10th, nor that he suffered anything with reference to his feet, further than he had already stated,—that is a strained or bruised ankle. He had evidently forgotten, when writing that letter, the contents of the release that no promise of future employment was made to him. In any event, there is no attempt made in this action to set aside the release on any claim that a permanent job was promised him.

He went back to work that night, and the testimony of six witnesses,—two of whom are not in the employ of the defendant and have no interest in the lititgation,—shows that he did his work the same as he had done it before the accident, and that when he left in July he stated that he was going back to Spokane to see his family. (67-74) No claim was made that he had left on account of any sickness or injuries caused by the accident. In addition to this he stated to Mr. Putnam at Buffalo, a week after the accident, when Putnam asked him with reference to it,—how he felt,—that he felt all right. (78) This is not denied. Upon his return to the boarding car the day of the accident, and at supper, he told the men, apparently in an effort to magnify the settlement, that he had settled for thirty dollars. In view of his seven signatures and endorsements, of his conversations with two witnesses at the time of the settlement, his statement to six witnesses upon the same day, and his letter of October 22nd, can there be any doubt that this man knew that he had settled?

Reid's testimony shows upon its face such contradictions that it cannot be said to be of the clear and convincing nature required to overturn a written instrument, even without any other testimony in the case. For instance, he says he was in good condition prior to the accident (p. 29), and yet even upon direct examination had to admit that he had a rupture before (30). He says he couldn't remember one thing he signed or anything (28) and yet he gives the

details of the conversation between McElroy and the men at the station, (28) the words that the doctor used at the time he examined him, and words used at the time of the settlement. (28, 29) He even emphasizes this on rebuttal by stating that it was Mr. Foley who first suggested the ten dollars, and not himself. (79) Is it reasonable that a man would voluntarily take the train alone from Geyser, go forty miles to Great Falls and be conscious only of the things which he thinks might help him to set aside a release, and unconscious of things which would be detrimental to such an action?

Upon this evidence Judge Rudkin found that Reid's condition at the time of the trial, of a poorly nourished body and general health and physical condition far from good, could not be said to be attributable wholly or even in a considerable part to the accident; that his arteriosclerosis was not produced in any way by the accident; that the condition of the right foot, although it might have been aggravated by the accident, was not caused thereby; that he had had a hernia on the right side for two years before the accident, and that the course of the development of his second hernia after the accident was left in doubt and uncertainty; that the first definite information of a second hernia was eight or nine months later, and that beyond that the testimony throws no light upon his condition or cause thereof, and then he says:

> "Good faith, common honesty and the peace of society demand that compromises and settlements of this kind should be upheld unless impeached for fraud or mistake by clear and convincing proof,"

and quotes from Judge Sanborn's opinion in the Wilcox case that such settlements and agreements "will not be lightly disturbed upon confused, conflicting or uncertain evidence of fraud or mistake * * * and a bare preponderance of evidence will not sustain the burden."

Judge Rudkin's statement of the facts shows all the conditions which he himself says will preclude the setting aside of a settlement on the ground of mistake. The facts stated utterly disprove such claims. Upon the facts found by the Court and the application of the legal principles laid down by him to the facts, there can be no other conclusion therefrom than that the plaintiff has wholly failed to make out a case.

The authorities cited by Judge Rudkin sustain this position, which is also supported by the authorities hereinbefore referred to.

There are two cases which were urged in support of the contention that the release should be set aside, but which are in the distinctions which are made in them, authorities for the sustaining of the release in this case.

In *Lumley vs. Wabash Ry.*, 76 Fed. 66, the questions were raised by a demurrer as to the sufficiency

of the bill. It appeared that at the time the examination was made of the plaintiff by the company's surgeon, he complained of pains in the right shoulder, and that the physician disregarded this complaint and made no examination of his shoulder; that the claim agent and the surgeon together advised him he would be able to resume work in eight weeks. The release specifically set out a severely contused and lacerated wound on the forehead on the right side, fracture of right arm between the wrist and elbow, followed by general words relating to various injuries. The shoulder trouble increased, and it was afterwards discovered that it was dislocated and fractured. The sufficiency of the complaint was sustained on the ground that the statement of the physician that the pain in the plaintiff's shoulder was sympathetic, and was caused by the fracture below the elbow, was a postitive misrepresentation of the truth and an operative fraud.

There is no such showing in the Reid case. He was told frankly about all he complained of. The physician examined him for all of these troubles, and would not let him take off his coat to allow further examination. Reid

A release cannot be avoided because plaintiff discovered subsequently that his injuries were more serious than he thought them to be, even though his opinion may have been based upon that of the releasee's physician.

Chicago & N. W. Ry. v. Wilcox, 116 Fed. 914, 917.
Doty v. C. St. P. & K. C. Ry., 52 N. W. 135.
G. N. v. Fowler, 136 Fed. 121.

The evidence does not connect up the plaintiff's present condition with the accident. There is at the most only confused, conflicting and uncertain evidence that he suffered anything more from the accident than he settled for. There was no clear, unequivocal or convincing evidence of mistake, and if there was ever a case where there is every reason for sustaining the policy of the law and permitting a compromise and settlement of disputed claims, it is this one. We respectfully submit that both Judge Rudkin's findings of fact and the principles of law laid down by him should be sustained, but that his conclusion which is a *non sequitur* should be reversed, and this case remanded with instructions to dismiss the bill.

II.

THE PLAINTIFF BY HIS CONDUCT IS NOW ESTOPPED FROM SEEKING TO SET ASIDE THE SETTLEMENT AND RELEASE.

It appears from the evidence that at the time of his examination and settlement, that he would not let the doctor or anyone take off his clothing and examine him, and would not stay around Great Falls for the purpose of allowing observation of his condition.

Dr. A. F. Longeway testified:

"He also said he had a bruise about the

shoulder and about the arm. I examined his foot and found that it was injured and bruised and the ankle slightly sprained. He was walking on it, walked on it to the office. I asked him about his arm and he said that didn't amount to anything. *I asked him to take off his coat and he said that didn't amount to anything, his injuries were not bad and he wouldn't take off his coat and let me examine it.* He said that he would be all right; he was just bruised about the right arm and shoulder. Consequently he didn't take off his coat and I didn't examine his arm. He said it didn't amount to anything and would be all right. I bandaged his foot and told him to stay around two or three days and let me watch him. 'No,' he said, 'It is all right," * * * He didn't at that time complain to me about any hernia, or any other injury than these that I have testified to. He only complained of the injury to his foot and shoulder. * * *

When I examined Mr. Reid I examined his ankle and wanted to examine his shoulder, and he said it didn't amount to anything and wouldn't take off his coat. * * * I advised him to stay around two or three days and let me watch him, and he made the remark about his injury not amounting to anything and he wanted to get back to work. Didn't complain to me about any pains in his abdomen. Didn't tell me that he had had any hernia. Didn't say anything about his abdomen at all." (Tr. pp. 46-48).

He is fully corroborated by W. J. Burton, who testifies:

Dr. Longeway says: "Well, what seems to be the trouble?" He says, "Well, my ankle is hurt, I think." He said, "Well, take off your shoe." * * *

> And he asked him if he was injured any place else and he said he had a little bruise on his arm. The doctor says, "Take your coat off and let's look at it." "No," he says, "It isn't very bad, it don't amount to anything." I says to him, "Let me look at it." He says, "No, no," and he refused to take his coat off and then I spoke up and said, "Have you any other injury?" and he said, "No, just shook up a little," he says, "I was knocked down in the car." I says, "Well, you are sure you haven't any other injuries?" He says, "No, none at all only that ankle," and he says, "that pains because my feet have been crippled for a long time," he says, "and it hurts me." * * * The doctor asked him to stay around a day or two until the swelling went down and he said, "No, it isn't necessary; it don't amount to anything," and he wouldn't stay * * * I asked him to let the doctor see his arm and shoulder, and he refused to do it. He said there wasn't anything the matter, only his ankle and said it was all right. (Tr. pp. 51, 52, 57).

All that Reid has to say about this is as follows:

> "The doctor examined me in his office. I didn't refuse to let them,—I did not refuse nothing." (Tr. 79).

He does not deny the conversations detailed by Dr. Longeway and Mr. Burton, and they stand undisputed. He does not deny that he was asked to take off his coat, or to allow the doctor or Mr. Burton to look at his arm or shoulder; he does not deny that he was asked if he had any other injuries, and that he replied, "No, just shook up a little: I was knocked down in the car"; does not deny that in re-

sponse to the question: "Well, are you sure you haven't any other injuries", he said "no, none at all only that ankle." He doesn't deny that the doctor asked him to stay around a day or two and let the doctor watch him, and that he stated his injuries didn't amount to anything, and that he wouldn't stay around; he doesn't deny that at that time he made no statement whatever about the hernia he previously had, or any other hernia.

Where a party by his conduct waives inquiry into a fact, he cannot subsequently be heard to say that either he or the releasee were ignorant of such fact in an attempt to set aside the release.

Kowalke vs. Milwaukee Ry. Co., 79 N. W. 762.
G. N. vs. Fowler, 136 Fed. 123.

The Kowalke case is well considered, and a very instructive decision upon the question of mistake. Plaintiff's husband claimed his wife suffered an injury in an accident, and that she was pregnant at the time. Examination to ascertain the fact was proposed by defendant's surgeon, which she refused, stating that she was sure from certain symptoms that nothing of the sort existed. The doctors, from questions propounded to her, were not sure that she was. A general release was signed. She afterwards suffered a miscarriage. Suit was brought, and in a trial by the court on all the questions, except damage, a finding was made that mutual mistake was made in good faith by both her own and the defendant's physicians, without fraud or misrepresentation.

A judgment for the plaintiff was reversed. In discussing what is meant by "a mistake of fact" the court said, with reference to the difficulty of framing an accurate definition of this phrase:

> "This is not surprising, in view of the fact that the whole doctrine is an invasion or restriction upon that most fundamental rule of the law that contracts which parties see fit to make shall be enforced, and in view of the further consideration that one or both of the parties is often, if not usually, ignorant or forgetful of some facts, thoughtfulness of which might vary his conduct. The most philosophical definition we have found is that presented by *Pom. Eq. Jur.,* Sec. 839: 'An unconscious ignorance or forgetfulness of the existence or non-existence of a fact, past or present, material to the contract.' This definition contains several elements, each of which, as above suggested, must be explained and qualified in its practical application. Thus, the ignorance must be unconscious; that is, not a mental state of conscious want of knowledge whether a fact which may or may not exist does so. Kerr, Fraud & M., p. 432. This idea is involved in, and furnishes a reason for, the exception pointed out by Dixon, C. J., in *Hurd vs. Hall,* 12 Wis. 112, 127, on authority of *Kelly vs. Solari,* 9 Mees. & W. 54, viz.: Where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in the legal sense. These limitations are predicated upon common experience, that, if people contract under such circumstances, they usually intend to abide the resolution either way of the known uncertainty, and have insisted on and received consideration for taking that chance. Akin to the rule that the ignorance must be unconscious,

though going still further as an exception, is the other rule, that ignorance must not be due to negligence, although there be no actual suspicion with reference to the fact in question. *Pom. Eq. Jur.,* Sec. 856; Kerr, Fraud & M., p. 406; *Hurd vs. Hall,* 12 Wis. 126; *Conner vs. Welch,* 51 Wis. 431, 8 N. W. 260 * * *

Passing the requirement that the fact as to which mistake is made must be either past or present,—for it is obvious that the coming into existence of any future fact must at the time of contracting have been understood to rest in conjecture, and the contingency thereof to have been assumed by both parties,—another essential element of the definition is that the fact involved in the mistake must have been as to a material part of the contract, or, as better expressed by Beach, *Mod. Eq. Prac.,* Sec. 352, an intrinsic fact; that is, not merely material in the sense that it might have had weight if known, but that its existence or nonexistence was intrinsic to the transaction, —one of the things actually contracted about. As, in the familiar illustration of the sale of a horse, the existence of the hose is an intrinsic fact. Another partial expression of this requisite, adopted by *Pom. Eq. Jur.,* Sec. 856, is as follows: 'If a mistake is made as to some fact which, though connected with the transaction, is incidental merely, and not a part of the very subject-matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for relief, affirmative or defensive.' The last part of this statement is adopted in *Klauber vs. Wright,* 52 Wis. 303, 308, 8 N. W. 893; *Grymes vs. Sanders,* 93 U. S. 55, 60. * * *

A further limitation upon the maxim, *'Ignorantia facti excusat,'* especially applicable to cases like the present, is that where parties have entered into contract based upon uncertain or con-

> tingent events, purposely, as a compromise of doubtful claims arising from them, in absence of any bad faith, no rescision can be had, though the facts turn out very differently from the expectation of either or both of the parties. In such classes of agreements the parties are presumed to calculate the chances, receive compensation therefor, and assume the risks. *Pom. Eq. Jur.*, Sec. 855; *Beach, Mod. Eq. Prac.*, Sec. 43, 56; *Bank vs. McGeoch*, 92 Wis. 286, 313, 66 N. W. 606. It is too obvious to require more than statement that, if parties fairly agree to abide uncertainty as to past or as to future events, they must do so. *Kercheval vs. Doty*, 31 Wis. 476."
>
> *Kowalke vs. Milwaukee Ry.*, 79 N. W. 764.

The testimony shows that even though Reid may have been ignorant of his condition, he certainly by his objection to a detailed examination, waived all inquiry into his condition. It must be conceded that he settled for his hurt on his foot, his being shaken up completely, and his nerves and nervous shock, for his feeling of weakness and pain, all of which he testified to as having been felt at the time he went to the doctor's office. He himself says that he was told to stay around a couple of days, and does not deny that the doctor told him to stay around two or three days and let him watch him. It is his claim that the next day he discovered something down there, where it hurt. This was a condition, which if he had not waived it, would have been discovered before the settlement, but by his conduct he waived it, and precluded all inquiry into it. He was being paid at the rate of two dollars a day, was away from his work

between breakfast and dinner of one day and received in consideration therefor ten dollars, keeping continuously at work from May 10th until July 2nd. Under these circumstances it is certainly evident that he intended to abide the resolution of the known uncertainty, and insisted upon and received consideration for taking that chance. If he suffered any further injuries than were apparent, the ignorance of these injuries was due to his negligence in failing to allow the examination, although he might not have had any suspicion with reference to the fact. Any mistake which might have been made was as to the coming into existence of the future fact, and this resting in conjecture, the contingency thereof was assumed by both the plaintiff and the defendant. Certainly, his conduct, both active and negligent, was such as indicated an intention to waive all inquiry into it, and the settlement was not made when he was in mistake. This is particularly true also by reason of the fact that the basis of an attempt to set aside this release is the second hernia. The only testimony with reference to this in the record is that of Dr. Marshall, in which he says that the lifting necessary for him to do would be more likely to cause the hernia which developed than any blow; that the fact of having the right inguinal hernia before showed that he had a tendency to it, as there is a tendency for hernia to be bi-lateral, and they are usually so. (Tr. 65, 66). With the development of the left hernia attributable to the right hernia, had prior to the accident, and the fact that hernias are usually bi-lateral,

that is, one on each side, the attempt to set aside the release on the ground of mistake as to this hernia is based upon confused, conflicting and uncertain evidence, which is not clear, unequivocal or convincing. Under Judge Rudkin's statement of the law, the opinion of Judge Sanborn in the Wilcox case, and all of the authorities, this should not be done. Furthermore, it is apparent that by his conduct he intended to waive all inquiry into the fact or investigation to show it, and he ought not now be allowed to offset good faith, common honesty and peace of society in an attempt to overturn his contract agreement.

III.

THE RELEASE WHICH WAS "FOR HIS PERSONAL INJURIES" AND "ALL CLAIMS,"—HE HAVING UTTERLY FAILED TO SHOW ANY FRAUD OR MISREPRESENTATION,—WAS CONCLUSIVE AND BINDING.

The release "released, acquitted and discharged the railway company from any and all liability, causes of action, costs, charges, claims or demands of every name and nature, in any manner arising or growing out of, or to arise or *grow out of personal injuries received* by me at or near Geyser in the State of Montana, on or about the 10th day of May, 1915, while acting as a cook I met with an accident whereby I sustained personal injuries."

This was executed twice and signed by Reid. Furthermore, he endorsed upon the back of that release, in his own handwriting, and under his own signature: "I have read within release before sign-

ing and *fully understand that the sum of ten dollars is in full settlement of all claim of every kind.*" In addition to this he executed an original and duplicate voucher, signed by himself, reciting "for and in consideration of any and all claims, past, present and prospective against the Great Northern Railway Company arising or to grow out of personal injuries received by me at or near Geyser, Montana, on or about May 10th, 1915, ten dollars." He also endorsed a draft, "Pay to the order of W. J. Reid ten and no-100 dollars for personal injuries received near Geyser, Montana, May 10th, 1915, as per release and receipted voucher for like amount attached hereto."

This constitutes seven distinctive executions by Reid of statements that he had made settlement in full for all personal injuries and all claims arising out of the accident at Geyser. There was no recital of any direct personal injuries, nor was the settlement limited to any special bruise or portion of his anatomy. This release being in general terms, covering all injuries, no evidence should have been allowed to be introduced, nor retained in the record, which was intended to show that there was not included in the release all the injuries claimed, either disclosed or undisclosed. The question was saved by objection to the introduction of such evidence, and by motion to strike the evidence, after it had been received subject to objection, at the conclusion of the trial.

(Tr. 26, 43, 62, 79; Assignment of Error 1, 2, 3, 5, 7).

A release of all damages of claims, without specifically mentioning the particular injuries, is not open to construction as to particular injuries to be included; and all injuries, developed or undeveloped, are considered to have been in the contemplation of the parties and embraces within the terms of the release.

Houston & T. C. R. Co. vs. McCarty, 53 L. R. A. 507; 60 S. W. 429.
Lumley vs. Wabash Ry., 76 Fed. 66.

In the Lumley case the Court referred to the fact that the specific words describing the injuries in the release operated as a release covering specific injuries only, and that the general words following relating to various injuries specifically enumerated. The court said:

> "But if this surgeon honestly supposed the shoulder pain to be sympathetic, either because his examination had been superficial, or because he had made none, we would then have a case where a release is comprehensive enough to cover a matter or claim unknown to both parties, and was therefore not the subject of consideration. Equity relieves from mistakes as well as frauds. The case is not one where it was sought to compromise and settle a general claim for all the injuries resulting from a particular accident, known and unknown. If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The subsequent discovery by one giving

> such release that he was worse hurt than he had supposed, would not, in and of itself, be ground for setting aside the settlement or limiting the release. We put our judgment upon the facts stated in this bill, to-wit, that both parties supposed complainant had received certain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties of a character so serious as to clearly indicate that, if it had been known, the release would not have been signed."

In this decision, which was subsequently quoted with approval by this court in the case of *G. N. vs. Fowler,* 136 Fed. 118, the exception was reserved: "If one agrees that he will receive a given amount in satisfaction and settlement of his damages, sustained through a particular accident, it is not essential that every possible consequence or tort shall be mentioned, considered or enumerated. Subsequent discovery by one giving such a release that he was worse hurt than he had supposed would not in and of itself be ground for setting aside the settlement or limiting the release," and the court impliedly holds that where there are particular words reciting particular injuries, a release should cover such particular injuries only, but where there are general words reciting general damages, and which

are in and of themselves sufficient to cover all injuries, that the release should be sustained as to such injuries.

Lumley vs. Wabash, 76 Fed. 66, 71.
G. N. vs. Fowler, 136 Fed. 118, 122.

This is specifically decided in the case of *Houston & T. C. R. Co. vs. McCarty,* 53 L. R. A. 507, in which the language of the release was almost identical with that shown by the evidence in the Reid case, and in which reference is made to the decision in the Lumley case. The court says:

> "This case is also clearly to be distinguished from the *Lumley Case* and the other cases on that line. In those cases the contract was neither set aside nor impaired by reason of any mistake of the parties to the release. There, by a rule of construction, the operation of the release is restricted to the particulars mentioned. Here, no particular injuries are mentioned. The release is of all damages which have accrued or may accrue to the plaintiff by reason of the accident in which he was injured. Here then, the terms of the release are not to be mistaken, and the contract is not open to construction. In the face of such an instrument, it cannot be said that all the injuries which might be developed as a result of the accident, whether known or unknown, were not in the contemplation of the parties to the instrument, and were not embraced within its terms. In all such cases the damages are ascertainable in a legal sense, but in fact are uncertain in amount. Until the extent of the injuries has been clearly developed, they may be more or less than appearance would indicate, and therefore, in every settlement of the character of that under con-

sideration the parties take the chances of future development,—the one of paying more than an adequate compensation for the wrong inflicted, and the other of receiving less.

Our conclusion is that the release embraces all damages resulting from the injuries of the plaintiff, and that it cannot be varied by parol evidence tending to show that other injuries than that to the ankle were not in the contemplation of the parties."

Houston & T. C. R. Co. vs. McCarty, 53 L. R. A. 507; 60 S. W. 421.

CONCLUSION

The trial court specifically found that there was no fraud or misrepresentation in any respects claimed in the complaint. He further specifically found that as to any claim of mistake the plaintiff's general condition could not be said to be attributable wholly or in part to the accident; that this involved three claims: arteriosclerosis, double flat foot and hernias; that neither the arteriosclerosis or double flat foot were consequent upon the injury, and that the development of hernias was left in doubt and uncertainty. All of the elements, in fact and law, why this settlement should not be overturned and why it should be sustained are contained in the finding of the trial court, and constitute a foundation for a correct conclusion which should have been arrived at from these elements. We ask this court to place the proper superstructure upon this foundation, and reverse the conclusions of the trial court.

There was no mistake, such as equity relieves against, shown as to injuries not included in the settlement, for there was no showing that any injuries have developed which were not included. There is no evidence that the second hernia was the result of the accident. Its first appearance is recorded on February 26th, 1916, nine months after the accident. Furthermore, under the *Kowalke* and other decisions, cited with approval in the *Fowler* case, there cannot be any doubt that the conduct of the plaintiff at the time of the examination was such that he waived by his statements with reference to his injuries and further examination, all inquiry into, or investigation relating to, other injuries, and that neither he nor the defendant were in mistake, such as is contemplated by the courts of equity.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Appellant.